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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/622,224	07/18/2003	Steven J. Iseberg	10841US07	4645

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MCANDREWS HELD & MALLOY, LTD  
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CHICAGO, IL 60661

EXAMINER

LE, HUYEN D

ART UNIT PAPER NUMBER

2643

DATE MAILED: 02/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/622,224

Applicant(s)

ISEBERG ET AL.

Examiner

HUYEN D. LE

Art Unit

2643

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 58-73 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 58-73 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____.  |

## DETAILED ACTION

### *Reissue Applications*

1. The reissue oath/declaration filed with this application is defective because the error which is relied upon to support the reissue application is not an error upon which a reissue can be based. See 37 CFR 1.175(a)(1) and MPEP § 1414.

The Declaration filed 07/18/2003 is defective because the error for a “housing” in stead of a “unitary housing” in claims 16-58 is not an error upon which a reissue can be based.

2. In accordance with 37 CFR 1.175(b)(1), a supplemental reissue oath/declaration under 37 CFR 1.175(b)(1) must be received before this reissue application can be allowed.

Claims 59-73 are rejected as being based upon a defective reissue declaration under 35 U.S.C. 251. See 37 CFR 1.175. The nature of the defect is set forth above.

Receipt of an appropriate supplemental oath/declaration under 37 CFR 1.175(b)(1) will overcome this rejection under 35 U.S.C. 251. An example of acceptable language to be used in the supplemental oath/declaration is as follows:

“Every error in the patent which was corrected in the present reissue application, and is not covered by a prior oath/declaration submitted in this application, arose without any deceptive intention on the part of the applicant.”

On page 2 of the Declaration, it states that “all error being corrected ... without any deceptive intention on the part of any other applicant”. It is not clear who is referred as “any other applicant”. The Declaration should be corrected by changing “any other applicant” to --the applicants-- or deleting “on the part of any other applicant”.

**AMENDMENT TO THE CLAIMS**

3. Claims added to the patent must follow the number of the highest numbered patent claim (37 CFR 1.121(b)(2)(i)(B)) and must be underlined in their entirety.

New claims 59-73 must be underlined in their entirety.

**Objection C.F.R. 1.75**

4. Claims 59, 63 and 65-66 are objected as presenting inconsistencies.

In claim 59, lines 2 and 5, and claim 65, line 3, before “tubular”, --elongated—should be inserted.

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

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6. Claims 59, 67, 68 and 73 are rejected under 35 U.S.C. 103(a) as being unpatentable over McCabe (U.S. patent 3,671,685) in view of Miyahra et al. (U.S. patent 4,447,677) and further in view of Killion (U.S. patent 4,677,679).

Regarding claims 59 and 73, Kelsey teaches an insert earphone that comprises a housing (13, 13A, 13B, 13C, 13D) having a hollow elongated tubular portion (28), a receiver (15), a resilient sealing member (10, 10A, 10B, 10C, 10D) as claimed (figure 11). The housing extends into and substantially acoustically sealing the ear canal of the wearer as claimed (figure 11 and see page 3, lines 40-49).

As shown in the drawing, the earphone of Kelsey does not require a long flexible tube between the hollow elongated tubular portion of the housing and the resilient sealing member. Kelsey does not specifically teach that the earphone provides a high fidelity response as claimed. However, connecting a hearing aid to any communication system such as a high fidelity system or connecting a hearing aid to a circuitry or an amplifier for providing an output signal with relatively high fidelity is known in the art.

Therefore, it would have been obvious to one skilled in the art to connect the hearing aid of Kelsey to any communication system such as a high fidelity system or connecting the earphone of Kelsey to any audio signal processing circuitry for providing high fidelity frequency response to the device, or for providing a response that compensates for loss of external ear resonance and coupling resonance for the improved frequency characteristics.

Regarding claims 67-68, Kelsey shows the resilient sealing member (10) as claimed (figures 1 and 5).

7. Claims 59-68 and 73 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miyahra et al. (U.S. patent 4,447,677).

Regarding claims 59 and 73, Miyahra teaches an insert earphone that comprises a housing (3) having a hollow elongated tubular portion (12), a receiver (1), a sealing member (11) as claimed (figure 11). Miyahra does not specifically teach that the sealing member is a resilient material as claimed.

However, providing the earplug made of resilient material is known in the art.

Therefore, it would have been obvious to one skilled in the art to provide the earplug (11) of Miyahra device to be made of a resilient material for providing a better sealing to the ear canal of the wearer.

As shown in the drawing, the earphone of Miyahra does not require a long flexible tube between the hollow elongated tubular portion of the housing and the resilient sealing member. Miyahra does not specifically teach that the earphone provides a high fidelity response as claimed.

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However, connecting a hearing aid to any communication system such as a high fidelity system or connecting a hearing aid to a circuitry or an amplifier for providing an output with high fidelity audio signals is known in the art.

Therefore, it would have been obvious to one skilled in the art to connect the hearing aid of Miyahra to any communication system such as a high fidelity system or to an audio signal processing circuitry for providing high fidelity frequency response to the device, or for providing a response that compensates for loss of external ear resonance and coupling resonance for the improved frequency characteristics.

Regarding claims 60-63, Miyahra et al. teaches a resilient material (57) as claimed (figure 1 and see col. 4, lines 33-37).

Regarding claim 64, Miyahra shows the receiver (1) that is supported within the housing (3) as claimed (figure 1).

Regarding claim 65, Miyahra shows the receiver that is supported within the housing and has a sound outlet port (54, 55) extending partially into the hollow elongated tubular portion (12) of the housing (figure 1).

Regarding claim 66, as broadly claimed, the sound outlet port (55) extending partially into the hollow elongated tubular portion (12) of the housing (figure 1) directly contacts a surface of the hollow elongated tubular portion (12).

Regarding claim 67, Miyahra shows a resilient sealing member (11) that has one projecting flange portion.

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Regarding claim 68, Miyahra does not show a plurality of projecting flange portions as claimed. However, the examiner takes the Office Notice that providing a plurality of flange portions for the earplug or the sealing member is known in the art.

Therefore, it would have been obvious to one skilled in the art to provide a plurality of flange portions for the earplug (11) of Miyahra for providing a better sealing and holding the device to the ear canal of the wearer.

8. Claims 69-72 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelsey (U.S. patent 2,430,229) or Miyahra et al. (U.S. patent 4,447,677) in view of Killion (U.S. patent 4,677,679).

Regarding claims 69-70, Kelsey or Miyahra does not teach a filter as claimed. However, it is very well known in the art to provide a filter for improving the quality sound of the hearing aid device.

Killion teaches a network circuit (40, 40a, 40a', 40b) to be connected to a receiver (21) for providing a high-fidelity response (col. 3, lines 42-50 and col. 6, lines 44-56).

Therefore, it would have been obvious to one skilled in the art to provide the network circuit or the filter, as taught by Killion, to be connected to the receiver of Kelsey or Miyahra for modifying the frequency characteristics and providing high quality sound to the device.

Regarding claim 71-72, Kelsey or Miyahra in view of Killion do not specifically teach the location of the filter as claimed.



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However, the examiner takes the Office Notice that providing a network circuit or a filter in the hearing aid housing or a pocket unit such as a junction unit external to the housing is known in the art.

Therefore, it would have been obvious to one skilled in the art to provide the network or the filter, as taught by Killion, in the housing or a junction unit of the Kelsey or Miyahra hearing aid device for greater flexibility.

### ***Conclusion***

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to HUYEN D. LE whose telephone number is (703) 305-4844. The examiner can normally be reached on 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, CURTIS KUNTZ can be reached on (703) 305-4708. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



HL  
February 17, 2005

  
HUYEN LE  
PRIMARY EXAMINER

**(1) DO NOT SCAN THIS  
DOCUMENT INTO  
IFW.**

**(2) This document should  
be placed into an  
Examiner Note  
folder for this  
application.**

**REISSUE GUIDE**  
For the Patent Examiner Reissue Application Checklist

- (1) DO NOT SCAN THIS DOCUMENT INTO IFW.
- (2) This document should be placed into an Examiner Note folder for this application.

3/31/04

## REISSUE GUIDE

### For the Patent Examiner Reissue Application Checklist

The following items provide explanations for the corresponding questions on the Patent Examiner Reissue Application Checklist:

1. The original patent file can usually be obtained from Files Repository, if it is located there. Once the location of the patent file has been determined, an order for the file can be placed electronically from the examiner's PC on the PALM Intranet page under "FILE REPOSITORY ORDER." The examiner should review the prosecution history of the original patent file, including any late-filed Information Disclosure Statement(s), as part of the reissue examination. The patent file wrapper, or the IFW file (if the patent issued from an IFW application) should be obtained and reviewed before the Examiner discusses the reissue with the SPRE for the first time.
2. It is imperative that a determination of the patent term be made prior to commencing examination of a reissue application. Check the patent grant date, the effective filing date, and any terminal disclaimers which will control the term of the patent. (Also, any Patent Term Adjustment or Patent Term Extension may be found on the face of the patent or in a Certificate of Correction of the patent.) If the patent is at or near the end of its term, it may not be possible to reissue the patent before the expiration of the term.

The Examiner should also check for payment of maintenance fees using the patent number on the PC-based OASIS Home Page by selecting RAM. Maintenance fees are due at 3.5 years, 7.5 years and 11.5 years after the patent date.

If the patent has expired due to end of term or due to the failure to pay the required maintenance fees, all of the claims should be rejected under 35 U.S.C. 251 as lacking basis for reissue, because by statute a reissue application can only be granted for the unexpired portion of the term of the original patent. Cite *In re Morgan*, 990 F.2d 1230, 26 USPQ2d 1392 (Fed. Cir. 1983), which holds that reissue applications can only be issued for unexpired patents. If the patent term has expired due to nonpayment of maintenance fees, no reissue can be issued. To reinstate the original patent, a petition under 37 CFR 1.377 or 37 CFR 1.378 (to establish payment of maintenance fees) must be filed and granted.

3. The O.G. publication date is indicated on the top center of the file wrapper face of the gold and white reissue applications (09 and 10 series) or on the pink "REISSUE" tag (08 series and earlier applications). It may also be found by displaying "Contents" on the examiner's PC PALM screen, and checking the early Contents entries for "Notice of Reissue Published in *Official Gazette*." (MPEP 1430). If the notice has not been published, the application should be forwarded to OIPE for publication of the Notice, via the TC SPRE. No notice will be published for CPA reissue applications filed under 37 CFR 1.53(d). [Requests for Continued Examination (RCEs) are not considered new applications and thus, are not published.] Once announced in the *Official Gazette*, the reissue files, if they are not being worked on by the examiner, are then open to the public and are available for inspection and/or copying.
4. MPEP Sec. 1441 provides for a two-month delay period from the date of Notice of Reissue Filing in the *Official Gazette* in order that members of the public may have time to review the reissue application and submit pertinent information (in the form of a protest under 37 CFR § 1.291) to the Office before the examiner's first action. No Office action should be issued by the examiner until the expiration of the delay period (plus two weeks to allow for entry of papers). Continuation/divisional reissue applications may be taken up for action prior to the expiration of the two-month delay period.
5. See MPEP Sec. 1901.06. If the application contains a protest, the protest must be reviewed:
  - a) To determine if the protest or the application file wrapper indicates that a copy of the protest has been served on applicant or applicant's attorney or agent.
  - b) If the protest, or copy, does not indicate service on applicant or applicant's attorney or agent, then contact applicant or applicant's attorney or agent, but not the protestor, to determine if service was made.
  - c) If it is determined that service was made, then note that fact on the protest or on the application file, together with the date of the call to applicant.
  - d) If proof of service is not found, then bring the protest and application file to the attention of the TC SPRE for appropriate action.
  - e) If the protest is ready for consideration, then consider it in the next action as set forth in MPEP § 1901.06.
  - f) If necessary, the examiner may obtain applicant's comments on the protest before taking any further action. In such situations, the examiner will offer applicant an opportunity to file comments within a set period of time, usually one (1) month, unless circumstances warrant a longer period. Use Form Paragraph 19.01.

*In the next Office action, the examiner should indicate whether and how the grounds of the protest are used. The Office action should include a detailed statement of the examiner's consideration of the protest in view of MPEP 1901.06, even if the grounds are not used in the Office action.*

6. If the reissue application is a division or a continuation of another copending reissue application, the related applications must be amended to include a cross reference to the other(s) at line 1 of the first page of the specification. 37 CFR 1.177. CHECK "CONTINUITY" SCREEN IN PALM FOR RELATED APPLICATIONS. The cross-reference in the specification serves as a notification to the public that more than one reissue may replace the single original patent. If the reissue applications are still pending, the applicant should be required to amend the specification to cross-reference the multiple applications (37 CFR 1.177). If one of the reissue applications has, however, already issued without the cross-reference, a Certificate of Correction adding the necessary cross-reference will be issued (action must be initiated by the examiner with the assistance of the TC SPRE to see that this is done). See MPEP 1451 for use of Form Paragraph 10.19 (Memorandum). The claimed subject matter in each application must also be examined for double patenting related issues and, where appropriate, rejections relating thereto must be made.

The claims of the original patent must be presented with original numbering in each of the multiple reissue applications in unamended, amended or bracketed form; however, the unamended version will only be issued, if found allowable, in one of the multiple reissues. Added claims will be numbered beginning with the next highest number (following the original numbers) in each of the multiple reissues.

7. The information relating to any litigation may be found in the record of the reissue or through a litigation search requested from the Scientific and Technical Information Center (STIC). If the patent is involved in litigation, or the litigation has been stayed, a one (1) month reply period **MUST** be set in all Office actions. See MPEP § 1442.01. If no litigation is involved, a normal three (3) month shortened statutory reply period should be set in all Office actions. A two month period must be set if the reissue has been merged with a reexam (see TC SPRE).

If it is determined that litigation is ongoing, action should be suspended using form paragraph 14.11 unless any one of the following applies: (A) a stay of litigation is in effect; (B) the litigation has been terminated; (C) there are no significant overlapping issues between the application and the litigation; or (D) applicant has requested that the application be examined at this time.

Applicants are under a continuing duty under 37 CFR 1.178 to inform the Office of related proceedings involving the original patent.

8. If the patent (or the reissue application) has been assigned, 37 CFR § 1.172 requires that all assignees owning an undivided interest consent to the filing of the reissue application. If there is no assignee, the application should so state. Otherwise, it can be assumed the patent and/or reissue application is assigned. MPEP 1410.01 discusses the acceptance of the reissue application for examination upon the filing of a petition requesting waiver of the requirements of § 1.172; however, the application cannot be allowed without consent of all assignees.

9. Assignees must establish their ownership interest in the patent on which the reissue application is based by strictly complying with the provisions of 37 CFR § 3.73(b). MPEP 324. An assignee's ownership may be established by ("a" or "b") and "c" below:

a. submitting to the Office copies of the documentary evidence of a chain of title from the original owner to the assignee (e.g., copy of an executed assignment submitted for recording) as set forth in 37 CFR 3.73(b), or

b. specifying where such documentary evidence is recorded in the Office (e.g., by reel and frame number), and

c. submitting a statement establishing ownership that must be signed by a party authorized to act on behalf of the assignee, generally an officer of the assignee company. The statement may, however, be signed by any person if it contains an averment that the person is empowered or authorized to sign on behalf of the assignee.

The statement establishing ownership and the consent must be signed by a person having the authority to do so. See the sample form in Sec. 324 of the MPEP.

If the assignee is an organization (e.g., corporation, partnership, university, government agency, etc.), then:

A. the statement may be signed by a person in the organization having the apparent authority to sign on behalf of the organization (e.g., an officer of the organization, a chairman of the board of directors, etc.) or

B. the statement may be signed by any person, if the statement includes an averment that the person signing is empowered to sign such statement on behalf of the assignee.

10. Certificate of Correction changes must be entered in the reissue application without bracketing or underlining. This will incorporate the changes as part of the original patent and not as changes in the reissue. (Note: A clean copy of the specification with the Certificate of Correction(s) changes incorporated therein may be requested by the examiner in the event such changes are extensive. Since the presentation of a substitute specification in a reissue application is, however, prohibited by rule. Thus, applicant must be advised that the substitute specification must be accompanied by a petition under 37 CFR 1.183 for waiver of 37 CFR 1.125(d) and 37 CFR 1.173(a)(1). Such a petition is decided by an OPLA Senior Legal Advisor.)

11. Errors that are not correctable by reissue include, for example:

(a) Claiming subject matter in the reissue application which was canceled in response to a restriction requirement during prosecution of the original patent. *In re Orita*, 193 USPQ 145. Reissue may not be utilized to reclaim subject matter which was nonelected in the original application. 35 U.S.C. 251 cannot be used to circumvent other statutory requirements, e.g., the copendency requirement of 35 U.S.C. 120 for filing divisional applications on nonelected subject matter. This also applies to broadened variations of nonelected subject matter. (See MPEP 1402 and 1450).

(b) The filing of a reissue solely for the purpose of adding citations of additional prior art.

A rejection based on "lack of reissuable" error under 35 U.S.C. 251 should be made in either of the above situations.

Additionally, no-defect reissue applications, i.e., applications filed without any assertion of an error in the original patent, are improper. Usually, this type of reissue contains no changes to the specification, drawings, or claims, and states no specific error in the oath/declaration. The applicant may merely be seeking a patentability determination via reissue rather than reexamination. The claims should be rejected under 35 U.S.C. 251 for lack of error and as lacking statutory basis.

(c) Errors which are merely editorial or typographical in nature (that could be corrected by Certificate of Correction) may not, by themselves, sustain or support a reissue.

12. If claims are broader in any respect, i.e., they read on subject matter the patent claims did not previously read on, check to see that:

(a) the reissue application was filed with the inventors as applicants (35 U.S.C. 251, third para.), and

(b) the reissue application has an effective filing date within two (2) years of the original patent date (35 U.S.C. 251, fourth paragraph).

In addition, the examiner should determine, that where broadening exists, the broadened claims, or a clear intent to broaden the claims, were first presented within two years of the patent date. [For example, if a reissue application was filed within two years of the patent grant date, but did not include either a preliminary amendment with broadened claims or a statement (even in an unexecuted declaration) establishing an intent to broaden, and a preliminary amendment or executed declaration with a statement of intent to broaden was filed outside the two years (as a response to a Missing Parts Notice), applicants would not have satisfied the statutory requirement of broadening within two years.] See MPEP Sec. 1412.03.

13. A reissue application will not be permitted to "recapture" claimed subject matter deliberately canceled in the original application. NOTE: See *Pannu v. Storz Instruments, Inc.*, 59 USPQ2d 1597; *In re Clement*, 45 USPQ2d 1161 (Fed. Cir. 1997). See MPEP § 1412.02. Note also that in *Hester v. Stein, Inc.*, 46 USPQ2d 1641 (Fed. Cir. 1998), the court held that the recapture rule can be triggered by argument alone.

Examiners should consult the Memorandum on "Updated Guidance as to Applying the Recapture Rule to Reissue Applications" issued on August 4, 2003, by the Deputy Commissioner for Patent Examination Policy for a statement of Office policy on recapture and examples involving recapture issues. This memo may be obtained from the TC SPRES, or it can be accessed via the WEB at <http://ptoweb/patents/opla/documents>.

14. See MPEP § 1416. If the original ribboned copy of the patent has not been surrendered, the examiner should point this out in the next Office action. NOTE: Either the original patent, or a statement addressing the loss or inaccessibility of the original patent, must be received before the reissue application can be allowed. *If this is the only remaining issue left to resolve in the reissue application, an Ex Parte Quayle action should be mailed.* When the original patent (or a statement as to loss thereof) is surrendered in an 09/ or 10/ series application, the box on the reissue file wrapper must be checked and initialed, and the original patent number entered (these requirements pertain only to 09/ and 10/ series applications).

15. If the reissue seeks to provoke an interference with an issued patent, the examiner should carefully review MPEP §§ 1449.02 and 2306 through 2308. The reissue application should be examined on the merits to determine (1) if actual changes in either the specification or claims have been made, i.e., it is not an improper no-defect reissue application, and (2) if there is at least one allowable claim which corresponds to a proposed count of the interference before an interference can be declared (see *In re Keil* 800 F.2d 830, 1 USPQ2d 1427 (Fed.Cir. 1987)). NOTE: 35 U.S.C. 135(b) states that "A claim which is the same as, or for the same or substantially the same subject matter as, a claim of an issued patent may not be made in any application unless such a claim is made prior to one year from the date on which the patent was granted."

See MPEP § 2306 to determine who prepares the PTO-Form 850, Initial Interference Memorandum, when an applicant seeks to provoke an interference with a patent classified in another group.

If the original patent is involved in an interference, the examiner must consult the administrative patent judge (APJ) in charge of the interference before taking any action on the reissue application. It is particularly important that the reissue application not be allowed without the APJ's approval.

16. If the reissue application or the original patent has emerged from an interference proceeding as a losing party, the patentability of the claims should be reviewed with respect to the count(s) of the interference. See MPEP § 2363.03.



17. See MPEP § 1413. Copies of the drawings from the printed patent may be submitted as the drawings in the reissue application and will be used as the drawings for publication in the printed reissue patent. The drawings from the patent file will not be transferred to the reissue. New or amended figures on drawings must be filed as per 37 CFR 1.173(b)(3).
18. See MPEP § 1414. All of the items a through g, listed below, relate to requirements of 37 CFR §§ 1.63 and 1.175 and must be complied with. NOTE: All oaths must be properly notarized and declarations must include declarant's warning against perjury and jeopardy to the validity of the patent.
- a. The oath or declaration must identify the specification to which it is directed as required by 37CFR 1.63(a)(2). [ See MPEP § 601.01(a) for guidance regarding the acceptable minimums for identifying the specification in an oath or declaration.]
  - b. The oath or declaration must identify each inventor by full name, and country of citizenship as required by 35 U.S.C. 115 and 37 CFR 1.63(a)(3). Each inventor's residence and mailing address must also be provided, if they have not been supplied in the application data sheet (37 CFR 1.76). When filed by the assignee, the required information must be present, even if it is asserted that it is based on the last available information known to assignee ("upon information and belief").
  - c. The oath or declaration must state whether the inventor is a sole or joint inventor of the invention claimed as required by 37 CFR 1.63(a)(4).
  - d. The oath or declaration must state that the person signing has reviewed and understands the contents of the specification, including the claims, as amended by any amendment specifically referred to in the oath or declaration as required by 37 CFR 1.63(b)(1).
  - e. The oath or declaration must state that the person signing believes the named inventor or inventors to be the original and first inventor or inventors of the subject matter which is claimed and for which a patent is sought as required by 37 CFR 1.63(b)(2).
  - f. The oath or declaration must state that the person signing acknowledges the duty to disclose to the Office all information known to the person to be material to patentability as defined in 37 CFR 1.56 as required by 37 CFR 1.63(b)(3).
  - g. Unless supplied in an application data sheet (ADS) (See 37 CFR 1.76), the oath or declaration must identify the foreign application, if any, on which foreign priority is being claimed by specifying the application number, country, day, month, and year of its filing as required by 37 CFR 1.63(c). If the original patent contains a claim for foreign priority, such claim must be repeated in the reissue application in order to retain priority to the earlier effective filing date. MPEP 1417.

- h. The oath or declaration must comply with 37 CFR 1.175(a)(1) by stating that the applicant believes the original patent to be wholly (or partly) inoperative (or invalid) by reason of (1) a defective specification (or drawing) or (2) by reason of the patentee claiming more (or less) than the patentee had a right to claim in the patent.
  - i. The oath or declaration must identify at least one error being relied upon as a basis for the reissue and that it is indeed an appropriate error for reissue (37 CFR 1.175(a)(1)). For example, "failure to include the following claims in the original patent..." is not an acceptable statement of an error. Specific changes or amendments to the claims must be identified. If new claims are presented, their differences from the original claims must be pointed out. See MPEP 1414.
  - j. The oath or declaration must state that "all errors being corrected in the reissue application up to the time of the filing of the oath or declaration arose without any deceptive intention on the part of the applicant" (37 CFR 1.175(a)(2)) or language equivalent thereto.
  - k. CHECK AT ALLOWANCE: For any error corrected, which is not covered by an oath or declaration, i.e., any error corrected after the filing of all declarations currently in the reissue application, applicant **MUST** submit a supplemental oath or declaration prior to allowance stating "[T]hat every such error arose without any deceptive intention on the part of the applicant" (37 CFR 1.175(b)(1)), or language equivalent thereto. See MPEP 1444 for handling supplemental oaths/declarations.
  - l. All oaths/declarations in a broadening reissue must be signed by all of the inventors. In a non-broadening reissue, either the inventors or the assignee(s) must sign the oath or declaration. MPEP 1410.01.
19. If applicant presents claims in the reissue to subject matter drawn to an invention patentably distinct from the invention claimed in the patent, 37 CFR 1.176 now permits the examiner to make a requirement for restriction. Where a restriction requirement is made, the original patent claims will be held to be constructively elected and the examiner will issue an Office action on the merits providing notification of the restriction requirement in such Office action. The examiner should hold the original patent claims to be constructively elected, unless a disclaimer of all the patent claims is filed in the reissue application, which disclaimer cannot be withdrawn by applicant. Thus, the examiner should issue an Office action (1) providing notification of the restriction requirement, (2) holding the added claims to be constructively non-elected and withdrawn from consideration, and (3) treating the original patent claims on the merits. See MPEP 1450.

The criteria for making a restriction requirement in a reissue application between claims added to the patent (in the reissue) and original patent claims is the same as that applied in a non-reissue application. See MPEP 806 through 806.05(i).

The original patent claims (which have been constructively elected) will receive a complete examination on their merits, while the nonelected (added) claims directed to the added invention(s) will be held in abeyance as withdrawn from consideration. The original claims cannot be issued in the first reissue application as unamended unless there is a reissue error identified in the oath/declaration not directed to the claims (e.g., failure to perfect § 119 priority), since they do not correct any error in the original patent (by themselves). If the original patent claims have been amended (in order to correct an error in the original patent which has been properly identified in the reissue declaration), and have been found allowable, they may be passed to issue in the first reissue.

If the reissue application contains only original unamended claims and is found to be allowable and no “error” under § 251 exists, further action in the reissue application may have to be suspended while a divisional application is filed for one of the non-elected inventions and is examined, or while an already filed divisional for a non-elected invention is examined. This is because the Office will not grant a reissue patent which does not correct any error in the original patent.

Where restriction has been made as discussed above, the nonelected (added) claims will only be examined if filed in a divisional reissue application (unless a disclaimer of all the patent claims is filed by applicant). Once a divisional application containing the added claims is examined and such claims are determined to be allowable, the examiner will send to the applicant a requirement under 37 CFR 1.177 to merge the two (or more) sets of allowable claims (the original claims in the first reissue application, and the added claims in the divisional) into a single application, setting a two-month period (a *Quayle* action). If applicant fails to respond to the requirement, or otherwise refuses to comply, the added and examined claims (of the divisional application) will be passed to issue alone (since they, by themselves, do correct an error in the original patent), and prosecution will be reopened in the suspended first reissue application. A rejection based on lack of reissuable error under 35 U.S.C. 251 will be made in the first reissue application.

If the divisional application(s) goes abandoned, prosecution will be reopened in the suspended first reissue application, and a rejection based on lack of reissuable error under 35 U.S.C. 251 will then be made in that application. Since no error in the original patent is being corrected, no reissue will issue. At that time, the applicant may request return of the original surrendered patent from the TC.

20. The examiner must determine if the patent (for which reissue is sought) is undergoing reexamination in a concurrent proceeding. This information is available by clicking on “Continuity Data” in PALM under the original patent number. A listing of any reissue application or reexamination proceeding can be found under “Child Data.” If a request for reexamination has been filed, the examiner should forward all related files (including all reissue files and the reexam file, if it is available) to the Office of Patent Legal Administration (OPLA), via the TC SPRE, for consideration of a merger of the two proceedings.

21. If all of the applicable items listed below relating to the manner of making reissue amendments have NOT been complied with, the examiner should either telephone the attorney to request a supplemental amendment in full compliance with 37 CFR 1.173(b), or if not under final rejection, the amendment should be considered non-responsive and applicant given a one-month shortened statutory period to submit a substitute or supplemental amendment in full compliance with 37 CFR 1.173(b). *If the amendment is in reply to a final rejection, complete an Advisory Action form rather than a new Office action, i.e., a new period for reply should NOT be given to submit the corrected reply. See MPEP Sec. 714.03.*

Amendments to the specification may only be made as set forth in 37 CFR 1.173(b)(1), as follows:

- a. An entire paragraph may be deleted by a statement requesting/directing the deletion of a specified paragraph without presentation of the text of such paragraph. 37 CFR 1.173(b)(1).
- b. Any change in the specification (other than (a) above) must be presented as an entire paragraph (when proposed by the applicant). The precise point in the specification must be indicated where the amended paragraph is to be located. 37 CFR 1.173(b)(1). All subject matter being added to the patent must be underlined. All subject matter being deleted from the patent must be placed between brackets. 37 CFR 1.173(d). Examiner's Amendment exceptions as set out in revised 37 CFR 1.121(g) apply in reissue applications. See MPEP 1455.

Amendments to the claims may only be made as set forth in 37 CFR 1.173(b)(2), as follows:

- a. Original patent claims must not be renumbered. 37 CFR 1.173(e).
- b. Claims added to the patent must follow the number of the highest numbered patent claim (37 CFR 1.173(e)), and must be underlined in their entirety (37 CFR 1.173(d)).
- c. A claim (original or new) may be deleted by a statement requesting the deletion of a specified claim without presentation of the text of such claim. 37 CFR 1.173(b)(2).
- d. Any change to the text of a claim (original or new) must be presented as an entire numbered claim. All subject matter being added to an original patent claim must be underlined. All subject matter being deleted from an original patent claim must be placed between brackets. 37 CFR 1.173(b)(2) and (d). Subject matter being added to a new claim requires rewriting (and underlining) of the entire new claim.
- e. If a claim is amended during reissue prosecution, a parenthetical expression "(amended)," "(twice amended)," etc., should follow the original claim number. 37 CFR 1.173(b)(2). Alternatively, applicant may effectively re-write a claim by presenting it as a new (fully underlined) claim with a new claim number, and canceling the old claim. Brackets and underlining are to be used to reflect only those changes in the text from the original patented text and not from any previous amendment in the reissue application. § 1.173(g).

- f. Each amendment submission must set forth the status of all patent claims and of all added claims (i.e., “pending” or “canceled”) as of the date of the amendment. 37 CFR 1.173(c).
- g. Each amendatory change, when first submitted, must be accompanied by an explanation of the support in the disclosure of the patent for the change (along with any additional comments) on page(s) separate from the page(s) containing the amendment. 37 CFR 1.173(c).

**Amendments to the drawing (37 CFR 1.173(b)(3)):**

- a. Amendments to the original patent drawings are not permitted. 37 CFR 1.173(b)(3).
- b. Any changes to the patent drawings must be made by way of a 37 CFR 1.84 compliant new replacement sheets containing the amended figures. Any such replacement sheet shall include all of the figures appearing on the original version of the sheet.
- c. Amended figures must be identified as “Amended,” and any added figure must be identified as “New.” Cancelled figures must be surrounded by brackets and identified as “Canceled.”
- d. An explanation of the changes must be provided in the remarks, preferably in the drawing amendments section, of the amendment paper.
- e. A marked-up copy of any amended drawing figure, including annotations indicating the changes made, may be included. If so, the marked-up copy should be clearly labeled as “Annotated Marked-up Drawings.”

**OTHER REQUIREMENTS/PROCEDURES TO BE CONSIDERED:**

- a. Reissues filed for the sole reason of obtaining a patentability opinion without any accompanying amendments to the specification, drawing or claims are considered to be improper. These are “no-defect” reissues and should be rejected under 35 U.S.C. 251 for lack of error. See Item 11 above.
- b. All claims in a reissue application stand or fall with the adequacy of the reissue oath/declaration(s). MPEP 1444. If the reissue oath/declaration is considered to be deficient, all of the claims of the reissue application should be rejected under 35 U.S.C. 251, citing the appropriate section of 37 CFR 1.175 upon which the deficiency is based. See *In re Clement*, cited above, in this regard.
- c. No reissue patent shall be granted enlarging the scope of the claims of the original patent unless applied for within two years from the grant of the original patent, pursuant to 35 U.S.C. 251 (and as further cited in 37 CFR 1.173(a)).
- d. No amendment to the patent may introduce new matter as set out in 35 U.S.C. 251 (and as cited in 37 CFR 1.173(a)).

- e. Original patent claims modified by a Reexamination Certificate are examined in accordance with their modified status, whereby the “recapture” doctrine will not permit applicant to acquire, through reissue, claims that are the same as, or broader than, the original patent claims that were canceled or amended through the reexamination framework. *Ex parte Morimoto*, 18 USPQ2d 1540 (BdPatApp & Int 1990).
- f. No restriction or election of species is permitted among the original claims of the patent during the reissue prosecution. See MPEP 1450.

**(1) DO NOT SCAN THIS  
DOCUMENT INTO  
IFW.**

**(2) This document should  
be placed into an  
Examiner Note  
folder for this  
application.**

**REISSUE CHECKLIST FOR IFW REISSUES**

3/24/04  
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(1) DO NOT SCAN THIS DOCUMENT INTO IFW.

(2) This document should be placed into an Examiner Note folder for this application.

**PATENT EXAMINER  
IFW REISSUE APPLICATION CHECKLIST**

3/24/04

Examiner: HUYEN LE

Art Unit : 2643

Reissue Appl. No.: 10,622,224

**THIS CHECKLIST IS PROVIDED AS AN AID TO THE REISSUE EXAMINATION PROCESS. IT SHOULD BE USED THROUGHOUT PROSECUTION AND MUST BE REMOVED FROM THE FILE AT THE TIME OF ALLOWANCE AFTER APPROVAL BY THE SPRE.**

Reissue applications are considered "SPECIAL" (MPEP § 1442). Any reissue application appearing on an examiner's docket report should be taken up for action as the next new or amended case, even before other special applications.

Prior to examining a reissue application, the examiner should obtain and review the original patent file if the patent issued from a paper application, or access the file history if the patent issued from a paper application. MPEP § 1440. Examination of the reissue application is frequently directly linked to the prosecution history of the original application for the patent to be reissued.

**ALL CLAIMS IN THE REISSUE APPLICATION ARE SUBJECT TO A FULL EXAMINATION ON THE MERITS, INCLUDING THE RE-PRESENTED ORIGINAL CLAIMS OF THE PATENT.**

Examiner: Complete items 1-20 prior to completing a first Office action.

Examiner - Complete items 21-22 when preparing the reissue application for allowance.

SPRE - Place his/her initials of approval on the Reissue IFW SPRE final review form that is scanned into the file history at the time of review for allowance.



## IFW Reissue Application Checklist

A "Reissue Guide" containing a further explanation of each of the items on the checklist is available in paper form or electronically (by e-mail) from the Technology Center SPRE or Paralegal.

Indicate that each of the applicable items set forth below has been thoroughly reviewed with respect to the above-identified reissue application by answering YES, NO, or N/A to the following questions. See TC SPRE for further assistance, if needed.

- YES 1. **Has the original patent file wrapper in paper, or file history in IFW, been obtained and reviewed?** *If NO, see "Reissue Guide" for further assistance.*
- YES 2. **Is the (original) patent still in force, i.e., has not expired due to the conclusion of its term or due to the non-payment of the scheduled maintenance fees?** *A reissue application must actually issue as a reissue patent before expiration of the original patent. Accordingly, always make sure the patent will not expire during prosecution of the reissue application. See "Reissue Guide" for methods of checking patent term.*
- YES 3. **Has notice of the filing of the reissue application been published in the Official Gazette (O.G.)?** *If NO, STOP action and have your TC Paralegal forward the application to OIPE to effect publication. Reissue RCEs are not announced in the O.G.*
- YES 4. **Is the current date more than two months after the O.G. publication date?** *If NO, wait until the two-month period has expired before preparing and issuing an Office action, unless directed otherwise by a decision of the Office of Patent Legal Administration or Office of Petitions in the file. Continuation/divisional reissues may be acted upon before the expiration of the two-month period.*
- NO 5. **Has the file been reviewed for the presence of any protests under 37 CFR 1.291(a)?** *Protests may be filed during the two-month period following the O.G. notice, or anytime up until the Notice of Allowance, and should be considered in the next Office action, if in the file. See "Reissue Guide" for instructions on handling protests.*
- NO 6. **Is the reissue application a division or a continuation of another pending reissue application, or is there a child reissue application that is a division or continuation of this application?** *See In re Graff, 42 USPQ2d 1471. If YES, special handling as per "Reissue Guide" is required. See Item 19 below for restriction practice.*
- NO 7. **Is the patent or the reissue application involved in litigation?** *Information may be found in file or requested from STIC. If YES, shortened reply periods may have to be set by the*

## IFW Reissue Application Checklist for Paper Reissues

*Examiner, or prosecution may have to be suspended. See "Reissue Guide." If NO, proceed with examination.*

\_\_\_ 8. If the reissue application has been assigned, does it include the written consent to the filing by all of the assignees (37 CFR 1.172(a))? See MPEP § 1410.01. *If NO, and a petition for a waiver of this requirement has been granted, the assent may be deferred until the case is otherwise allowable.*

YES 9. Have all documents (in applications filed on or after September 24, 1992) which are signed by, or on behalf of, the assignee(s) been checked and found to comply with the provisions of 37 CFR § 3.73(b)? This includes "consent" in No. 8, above. *If NO, the statement under § 3.73(b) must be required before allowance.*

NO 10. Were any changes made to the patent by a Certificate of Correction dated prior to the filing of the reissue? *If YES, check to see if the changes were properly entered as though part of the original patent, i.e., no brackets or underlining.*

\_\_\_ 11. Has the application been reviewed for the presence of any errors, including any not specifically identified, which are not correctable by reissue? *Reissue doesn't cure all patent ills. See "Reissue Guide" for listing of some errors which cannot be corrected by reissue.*

YES 12. Are any claims broader in scope (in ANY respect) than the original patent claims? *If YES, note 35 USC 251, 3rd and 4th paragraphs. If NO, proceed to item 14.*

NO 13. Does the broadening (from Item 12) attempt to "recapture" any claimed subject matter which was deliberately added, or argued, to overcome a rejection in the original application? *See "Reissue Guide" for explanation of "recapture doctrine." Subject matter deliberately surrendered may not be recaptured (reclaimed) in a reissue application.*

✓ 14. Has: (1) the original patent been surrendered OR (2) does the application contain a statement that the original patent is lost or misplaced? *If NO, the application cannot be allowed until either (1) or (2) is obtained.*

\_\_\_ 15. Does the reissue application seek to provoke an interference with another patent? *If NO, proceed to Item 17. If YES, see "Reissue Guide."*

## IFW Reissue Application Checklist for Paper Reissues

- \_\_\_\_ 16. Do the issues of interference estoppel and the "lost count" doctrine apply? *Applies to losing party of an interference. See "Reissue Guide."*
- YES 17. Does the application include drawings (copies or originals) which meet the requirements of 37 CFR 1.84? *If YES, be sure there are no amendments or additions to the original figures. Transfer of the drawings from the patent file is not done by the Office.*
- NO 18. Does the reissue oath or declaration comply with all of the requirements of 37 CFR § 1.63 and 37 CFR § 1.175? *See list of requirements in "Reissue Guide." If NOT, reject under 35 U.S.C. 251 (citing relevant portion of 37 CFR 1.63 or 1.175).*
- NO 19. Does the reissue application contain claims to more than one invention? 37 CFR 1.176. *If yes, and the several inventions were claimed in the patent, a restriction requirement dividing the several inventions cannot be made in the reissue. If added claims in the reissue are drawn to an invention not previously claimed, a restriction is possible. See Reissue Guide.*
- NO 20. Is the original patent currently involved in a reexamination proceeding? *To determine this, check "Continuity" in PALM for the original patent number. If YES, forward all related files (including any reexam or reissue directed to the original patent) to the Office of Patent Legal Administration (OPLA) for consideration of a merger of the proceedings.*

## THE FOLLOWING QUESTIONS SHOULD BE COMPLETED WHEN PREPARING THE APPLICATION FOR ALLOWANCE:

- \_\_\_\_ 21. Have all amendments to the specification, drawings and claims been reviewed and found to comply with 37 CFR § 1.173(b)? *See amendment practice described in "Reissue Guide." If NO, amendment in accordance with § 1.173(b) will be required.*
- \_\_\_\_ 22. The following items should be verified at the time of Allowance:
- \_\_\_\_ a. None of the original patent claims have been renumbered.
  - \_\_\_\_ b. Final numbering of claims added by reissue must follow the number of the highest numbered patent claim.
  - \_\_\_\_ c. The claim selected for printing is one which was added or amended during reissue - never a canceled claim. (Where no claim is amended/added, print the same claim printed in the original patent).
  - \_\_\_\_ d. On the Issue Classification sheet, the final claim numbering must be filled in properly. A canceled patented claim retains its original number although not considered in the total number of claims allowed. Therefore, on the Issue Classification Sheet, the number in the box designated "TOTAL CLAIMS ALLOWED" may be less than the highest number of the last allowed claim.

## Reissue Application Checklist for Paper Reissues

- \_\_\_\_ e. Any Examiner's Amendment which makes a change to the patent which change is substantive in nature may necessitate a supplemental reissue oath/declaration from applicant.
- \_\_\_\_ f. Classification and cross referencing on the Issue Classification Sheet should include at least those classes and subclasses designated on the original patent. If a reclassification prevents use of the same class/subclasses, the new class/subclasses should be used.
- \_\_\_\_ g. Terminal Disclaimer (TD) information has been placed in the IFW file wrapper for TDs filed either in the original patent or in the reissue application.
- \_\_\_\_ h. The references cited in the original patent have been cited in the reissue application on a Form PTO-892 or PTO-1449.
- \_\_\_\_ i. For any error corrected, which is not covered by an oath or declaration, i.e., any error corrected after the filing of all declarations currently in the reissue application, applicant **MUST** submit a supplemental oath or declaration prior to allowance stating "[T]hat every such error arose without any deceptive intention on the part of the applicant" (37 CFR 1.175(b)(1)), or language equivalent thereto. See MPEP 1444 for handling supplemental oaths/declarations.

The red Action folder including the Issue Classification Sheet for each allowed reissue application, together with the original patented file, if in paper, is submitted to the TC SPRE for review prior to being released from the Technology Center. Approval of the reissue is to be initialed by the TC SPRE on one of the papers that are scanned into the file history. The SPRE should also enter original patent number, where the SPRE initials. Once the reissue has been approved and revised for issue, the red Action Folder and any paper files should be sent to the Office of Patent Legal Administration.

**This checklist is to be removed from the Action Folder by the SPRE at the time of final review.**

All reissue applications are screened by the Office of Patent Legal Administration (OPLA). Thus, the office of the SPREs will "message" the OPLA IFW reissue mailbox, after the TC has finished working on the case, e.g., counted, mailed, and image uploaded to IFW of all work.

Examiner: \_\_\_\_\_

Date: \_\_\_\_\_